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[illegible]

[illegible] Company, Petitioner,

v.

[illegible], Respondent.

[illegible]

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Dated: May 28, [illegible]

[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner,*

v.

ELMORE & STAHL, *Respondent.*

On Writ of Certiorari to the Supreme Court of Texas

PETITION FOR REHEARING

Petitioner, Missouri Pacific Railroad Company, respectfully prays that this Court grant rehearing of its decision of May 4, 1964, affirming the judgment of the Texas Supreme Court in the above entitled case.

REASONS FOR GRANTING A REHEARING

The fundamental error in the Court's decision, we submit, stems from its expressed view that the standard of liability imposed at common law cannot be modified or affected in any fashion by a tariff provision which is a part of the shipping contract. (See page 4, Slip Opinion.)

This declaration is flatly at variance with the prior holdings of this Court. In *Adams Express Co.* v. *Croninger,* 226 U.S. 491, 509 (1913), the Court made it perfectly clear that it was permissible to vary, by

special contract or tariff provision, the standard imposed by the common law, provided that the variance did not go to the point of exonerating the carrier from liability for negligence. As the Court stated: "The rigor of this liability [the so-called "absolute" liability] might be modified through any fair, reasonable, and just agreement . . . which did not include exemption against the negligence of the carrier or his servants." The Court's declaration likewise is at variance with *Missouri, K. & T. Ry.* v. *Harriman Bros.*, 227 U.S. 657, 672 (1913). The authorities cited by the Court (Slip Opinion, p. 4) do not alter the holding of *Adams Express Co., supra.*[1]

While we contended on the argument of this case that the common law itself was fully in accord with the proposition we contended for—that in the case of spoilage of perishables, the carrier's burden is to prove its freedom from negligence and its compliance with the shipper's instructions—the Court has held against us on this point, and this holding is not the point of our contention in this petition. However, we submit (i) that Rules 130 and 135 of the applicable Perishable Protective Tariff No. 17 clearly incorporate the rule we contend for; (ii) that these tariffs prescribe the con-

[1] In *Cincinnati, New Orleans & Texas Pacific Railway Co.* v. *Rankin*, 241 U.S. 319 (1916), the Court held valid a provision in the bill of lading limiting the carrier's liability on the basis of a valuation declared by the shipper in consideration for a reduced rate of carriage. In *Boston & M.R.R.* v. *Piper*, 246 U.S. 439 (1918), the Court ruled only that "the principle that the carrier may not exonerate itself from losses negligently caused by it" precluded a provision in the bill of lading "limiting liability from unusual delay and detention, caused by the carrier's negligence, to the amount actually expended by the shipper in the purchase of food and water" for livestock during the period of delay.

ditions under which carriers accept perishables for transportation and define the standard of care required of the carrier;[2] (iii) and that if these rules are viewed without the Court's erroneous assumption that it is impermissible to vary the common law liability in any respect, a contrary result to the Court's holding is indicated.

The language of Rule 130 is clear and precise: The carrier does not "undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence." And Rule 135, specifically addressed to the "liability of carriers," provides that "The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper . . ."

The application of these rules to the present case is also clear. This is incontestably a case of "perishable goods" which "deteriorated or decayed." Here the carrier's obligation, it is specifically stated in the Rules, was simply to retard the deterioration or decay insofar as might be accomplished by performing the

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[2] The Court felt it "significant that the identical bill of lading is used for the shipment of both perishable and nonperishable commodities . . ." (Slip Opinion, p. 8, n. 15). However, in the case of perishables, the bill of lading incorporates by reference the provisions of the Perishable Protective Tariff; these tariffs are inapplicable to nonperishables. In short, the shipping contract in the case of perishables is not the same as the shipping contract involving nonperishable goods.

protective services as ordered by the shipper (as the jury found); and by performing the transportation services without negligence (as the jury also found).

The meaning of this tariff is plain; reference to the more generalized standard of the common law (see Slip Opinion, page 7) only serves to make it less clear. If anything, the Rule's precise test should have been used to interpret the common-law rule and its exceptions, rather than the common law used to interpret the rule. Whether, as was urged in dissent, this tariff be viewed simply as a particularization or application of the exceptions established at common law, or whether it be viewed as making a modification in the common law, its meaning is clear—the carrier is not liable for deterioration of perishables if it has prudently performed the protective services and all other duties. There is no reason, under the previous holdings of this Court, why it should not have been given literal effect.

Had the Court approached these tariff rules without the assumption that the tariffs could do no more than reflect, without alteration or even without further specification, the rule of the common law, we submit that it would have given the tariffs their plain effect, which would clearly have absolved the carrier from liability. It would not have ignored the tariffs altogether—which was the logical consequence of the Court's view of what the tariff Rules might accomplish, i.e., nothing.

The Court's decision in this case accordingly turns on a major premise which is flatly at variance with prior decisions of the Court. That major premise is that it is totally impermissible for a tariff to vary the

common law standard in any respect.[3] As we have shown, this major premise is flatly contradicted by prior holdings of the Court.

Because the Court's entire rejection of the literal meaning of Rules 130 and 135, controlling in this case, turns on this premise, we respectfully request that this petition for rehearing be granted.

Respectfully submitted,

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[3] At common law, a carrier was answerable for damage caused to a shipment by the acts of a mob or resulting from a strike. See authorities collected in Anno, 20 A.L.R. 262. The Uniform Straight Bill of Lading, applicable to the shipment in the present case, stipulates, however, that except in case of negligence, the carrier shall not be liable for damage resulting "from riots or strikes" (Tr. 150, Para. 1(b)). If, as the Court holds in the present case, the carrier is liable unless it can show that the damage resulted from one of the five excepted causes (Slip Opinion, p. 3) a cloud would be cast upon this provision in the bill—a provision which, so far as we are aware, has not been seriously questioned in 40 years.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ABE KRASH
Counsel for Petitioner